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No. 72-1162

In the Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. Background	4
B. Proceedings before the Commission	7
C. The decision below	11
Summary of argument	12
Argument	13
The Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act of 1952 to impose annual fees on companies subject to its jurisdiction in order to recoup a portion of its costs for administering the Federal Power Act and Natural Gas Act	13
A. Under Title V of the Independent Offices Appropriations Act of 1952, the costs of administrative services which specially benefit an entire regulated industry may be apportioned among the individual companies which comprise the industry	13
B. The services whose costs the Commission seeks to recoup through the assessment of annual fees provide the natural gas and electric utility industries with special benefits above and beyond those which accrue to the general public	16

517-810—73——1

Argument—Continued Page

C. Since the services to be supported by the Commission's annual fees provide special benefits to the natural gas and electric utility industries, above and beyond those which accrue to the general public from these services, charges for these services are appropriate notwithstanding the fact that the services may be conducted primarily for the benefit of the general public..... 21

Conclusion..... 26

CITATIONS

Cases:

Aeronautical Radio, Inc. v. *United States*, 335 F. 2d 304..... 20

City of Chicago v. *Federal Power Commission*, 385 F. 2d 629, certiorari denied *sub nom. Public Service Commission of Wisconsin* v. *Federal Power Commission*, 390 U.S. 945... 22

Clay Broadcasting Corp. v. *United States*, 464 F. 2d 1313, certiorari granted, May 14, 1973, *sub nom. National Cable Television Association* v. *United States*, No. 72-948... 7, 14-15, 24, 25

Federal Power Commission v. *Texaco, Inc.*, 377 U.S. 33..... 18

Fuels Research Council, Inc. v. *Federal Power Commission*, 374 F. 2d 842, affirming *Midwestern Gas Transmission Co.*, 34 F.P.C. 973..... 19

Gainesville Utilities Department v. *Florida Power Corp.*, 402 U.S. 515..... 20

Public Service Commission of the State of New York v. *Federal Power Commission*, 327 F. 2d 893..... 19

Cases—Continued Page
Public Service Commission of the State of New York v. *F.P.C.*, 462 F. 2d 853 18
Statutes and regulations:
Federal Power Act, 41 Stat. 1043, *et seq.*, as amended, 16 U.S.C. 791a, *et seq.* 2, 4
Section 10(e), 16 U.S.C. 803(e) 4
Section 201(b), 16 U.S.C. 824(b) 4
Section 201(e), 16 U.S.C. 824(e) 4
Section 301, 16 U.S.C. 825 10
Section 313(b), 16 U.S.C. 825*l*(b) 2
Natural Gas Act, 52 Stat. 821, *et seq.*, as amended, 15 U.S.C. 717, *et seq.* 2, 4
Section 2(6), 15 U.S.C. 717a(6) 4
Section 8, 15 U.S.C. 717g 10
Section 19(b), 15 U.S.C. 717*r*(b) 2
18 C.F.R. 11.20 4
18 C.F.R. 11.30 4
18 C.F.R. 260.7 9
Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a 2, 3, 4, 5, 6, 11, 12, 13–14, 15, 16, 21, 22
Miscellaneous:
23 FCC 2d 880, 35 Fed. Reg. 10988 7
97 Cong. Rec. 4908 23
Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess., Pt. 1 (1952) 23
Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess. (1970) 7

Miscellaneous—Continued Page
Hearings before a Subcommittee of the House Committee on Appropriations on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, 92d Cong., 1st Sess., Pt. 3 (1971) 25
H. Rep. No. 384, 82d Cong., 1st Sess 23
H. Rep. No. 1348, 90th Cong., 2d Sess 6
Notice of Proposed Rulemaking, Docket No. R–408, issued November 25, 1970, 35 Fed. Reg. 18324 8
Order No. 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order No. 317–A, 31 F.R. 4890, March 24, 1966 6
Order Nos. 455, *et al.*, issued in Docket No. R–441, August 3, 1972, pending review *sub nom. John E. Moss, et al.* v. *F.P.C.*, (C.A.D.C.), Nos. 72–1837, *et al* 19
Order No. 465, *et al.*, issued in Docket No. R–411 on December 29, 1972 pending review *Sub. nom. Public Service Commission of the State of New York* v. *Federal Power Commission*, No. 73–1338 (C.A.D.C.) 18
Phillips, *The Economics of Regulation* (1969) 19
Priest, 1 *Principles of Public Utility Regulation* (1969) 17
S. Rep. No. 1375, 90th Cong., 2d Sess 6
S. Rep. No. 2120, 81st Cong., 2d Sess 24

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 467 F. 2d 425. The order (No. 427) of the Federal Power Commission (Pet. App. 18a-50a) and its order denying rehearing (Pet. App. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (Pet. App. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on February 22, 1973,

and was granted on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup a portion of its costs of administering the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, through the imposition of annual fees on companies subject to its jurisdiction after taking into consideration the benefits such companies receive from Commission regulation.

STATUTE INVOLVED

Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-

sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

This case involves the authority of federal agencies under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup their administrative costs from the companies they regulate. The court of appeals construed Title V as not authorizing the Federal Power Commission to assess

annual fees on public utilities[1] and natural gas companies[2] subject to its jurisdiction to recover the administrative costs of the Commission not recouped by specific filing and other fees (Pet. App. 1a–13a).

A. BACKGROUND

Since the enactment of the Federal Water Power Act of 1920, now Part I of the Federal Power Act, 16 U.S.C. 791a–823, the Federal Power Commission has assessed annual and other charges against licensees of hydroelectric projects to reimburse the government for the Commission's costs of administering the Act. The imposition of these charges is specifically authorized by Part I of the Act. See 16 U.S.C. 803(e) and (f); 18 C.F.R. 11.20, 11.30. Parts II and III of the Federal Power Act, 16 U.S.C. 824, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, however, do not specifically direct the Commission to assess annual or other charges against companies subject to those statutes.

In 1951, long after the enactment of the Federal Power Act and the Natural Gas Act, Congress enacted Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a). The House report on Title V shows that Congress was concerned that fed-

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[1] Under Section 201(b) and (e) of the Federal Power Act, 16 U.S.C. 824(b) and (e), a "public utility" is defined as any person who owns or operates facilities for the transmission or sale of electric energy in interstate commerce.

[2] Under Section 2(6) of the Natural Gas Act, 15 U.S.C. 717a(6), a "natural-gas company" is defined as a person engaged in the transportation or sale for resale of natural gas in interstate commerce.

eral agencies were not receiving full return for many of the services they provide to special beneficiaries. The report noted that in some cases "no fees are charged even though the charging of fees is not prohibited * * *." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. To remedy this situation, Title V was proposed to

> * * * provide authority for Government agencies to make charges for * * * services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*Id.* at 3.]

As enacted, Title V provides in essence that any work, service, benefit or privilege performed, provided or granted by any federal agency to any person (including groups, associations, organizations, partnerships, corporations or businesses) shall be self-sustaining to the fullest extent possible. Accordingly, federal agencies are authorized to prescribe fees and charges which are

> * * * fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *. [31 U.S.C. 483a.]

All amounts collected under the statute are to be paid into the United States Treasury as miscellaneous receipts.

Bureau of the Budget Circular No. A–25 (September 23, 1959; set forth in Pet. App. 61a–62a) estab-

517-210—73——2

lishes guidelines to assist agencies in the implementation of Title V. The circular directs that where a service bestows special benefits upon identifiable recipients "above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service" (*id.* at 61a). The circular states, for example, that a charge should be imposed where a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (*e.g.*, certificates of necessity and convenience for airline routes, or safety inspections of crafts) * * *" (*id.* at 61a–62a). The circular also provides that (*id.* at 62a):

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (*e.g.*, licensing of new biological products).

Pursuant to Title V and the Bureau of the Budget Circular, the Federal Power Commission in 1966 established a schedule of filing fees under the Natural Gas Act. Order Nos. 317 and 317–A, 35 FPC 30, 31 Fed. Reg. 430, 4890. Subsequent to the adoption of these fees, congressional appropriations committees recommended that federal agencies review their fee schedules with a view to making increases or adjustments to offset in part the increasing funds which had to be appropriated by Congress to cover the operating costs of the agencies. S. Rep. No. 1375, 90th Cong., 2d Sess., p. 3; H. Rep. No. 1348, 90th Cong., 2d Sess., p. 4. And in 1970, the chairman of a House appropria-

tions subcommittee specifically requested the Federal Power Commission to review its fees, and urged the Commission to assess sufficient charges against natural gas companies and electric utilities subject to its jurisdiction to sustain its administrative operations. The chairman noted with approval the proposed increased fees which had been announced by the Federal Communications Commission.[3] Those fees were subsequently adopted by the FCC (23 FCC 2d 880, 35 Fed. Reg. 10988) and upheld by the Fifth Circuit. *Clay Broadcasting Corp.* v. *United States,* 464 F. 2d 1313 (reproduced in Pet. App. 63a–81a), certiorari granted May 14, 1973, *sub nom. National Cable Television Association* v. *United States,* No. 72–948.

B. PROCEEDINGS BEFORE THE COMMISSION

Following an extensive review of its existing fee structure and its administrative operations, the Commission proposed (1) to increase the filing fees under the Natural Gas Act, (2) to establish filing fees for applications under Parts II and III of the Federal Power Act, and (3) to recoup a portion of the remaining costs of its regulatory programs under both Acts through annual assessments. Notice of Proposed Rulemaking, Docket No. R–408, issued November 25, 1970,

[3] Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., part 2, p. 951 (1970). The chairman's reference at the hearings to the Federal Communications Commission's "schedule of increased rates to make them self-sustaining" (*ibid.*) appears to make no distinction between filing fees and annual assessments, both of which were involved in the FCC's action at that time.

35 Fed. Reg. 18324. Following the receipt of comments by sixty-four parties, the Commission issued Order No. 427, adopting the proposed fees with several modifications (Pet. App. 18a–50a).[4]

Under the Commission's order, annual charges are assessed as follows: With respect to electric utilities, the Commission determines each year the costs of administering Parts II and III of the Federal Power Act other than those costs associated with the Commission's efforts to promote the coordination and reliability of electric systems. The Commission then deducts from the administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amounts received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities in proportion to their wholesale sales and interchanges of electric energy. The costs of administering the Commission's reliability and coordination programs, after deduction of the portion of the costs attributable to nonjurisdictional utilities, are assessed against jurisdictional utilities in proportion to their gross revenues (Pet. App. 37a–38a).[5]

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[4] Only the portion of the Commission's order establishing annual charges was set aside by the court below. The new filing fees were not challenged and are now in effect.

[5] Documents filed with the Commission by the electric utility companies subject to the annual assessment here at issue show that in 1971 these companies had gross revenues of $21,093,709,000 and a total net income of $3,603,721,000. The projected 1973 annual assessment challenged here for all such companies is $5,137,484.00 or 0.024% of gross revenue and 0.14% of net income.

With respect to natural gas companies, the Commission determines each year the cost of administering the Commission's natural gas pipeline programs under the Natural Gas Act. These costs, after deduction of the amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In addition, all natural gas companies required to file an annual report on their total gas supply on FPC Form No. 15 (see 18 C.F.R. 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certificated each year (Pet. App. 45a–46a), to support the cost of the producer certificate program.[8]

In its order establishing the annual charges, the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (Pet. App. 30a). With respect to both electric utilities and natural gas companies, the Commission noted that Federal regulation had provided "the foundation for the

[8] Documents filed with the Commission by the pipeline companies subject to the annual assessment here at issue show that in 1972 these companies had gross revenues of $9,404,223,445 and a total net income of $1,047,625,385. The projected 1973 annual assessment for all such companies is $4,802,630 or 0.051% of gross revenues and 0.46% of net income.

sound financial condition which public utilities and natural gas companies have achieved" (*id.* at 30a).[7] The Commission referred, in particular, to "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" (*id.* at 30a, n. 5). See 16 U.S.C. 825; 15 U.S.C. 717g. The Commission recognized, of course, that its regulatory activities provide continuing benefits to consumers, but also noted that its actions

> * * * have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [Pet. App. 31a.]

In its order denying rehearing, the Commission again noted that its promotion of the coordination and reliability of the nation's electric systems was "system wide and beneficial" to electric utilities (Pet. App. 55a). With respect to natural gas companies, the Commission referred to the direct benefits pipelines receive from the Commission's regulation of the prices producers may charge for interstate sales of natural gas to pipelines. The Commission also identi-

[7] The Commission pointed out that the extension of its jurisdiction in 1935 to electric utilities "was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected" (Pet. App. 30a).

fied other of its activities, in connection with the certification of producer sales, that benefit pipelines. The activities mentioned were (*id.* at 57a):

> * * * the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

C. THE DECISION BELOW

On petitions for review, the court of appeals set aside the portion of the Commission's order establishing annual charges, holding that the charges are not authorized by Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) or Bureau of the Budget Circular No. A-25 (Pet. App. 1a-13a). In the court's view, the favorable "economic climate" resulting from federal regulation is not a benefit for which a charge can be made, since it is not a special service rendered to a special beneficiary (*id.* at 9a). The court concluded that the regulation of the electric utility and natural gas industries is "primarily for the benefit of the public" and that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (*id.* at 9a-10a).

Since it found the Commission to be without authority to act, the court of appeals did not reach the question whether the methods of allocation employed were proper (Pet. App. 2a).

SUMMARY OF ARGUMENT

A. The holding of the court of appeals that the constituent firms of whole industries cannot be "identifiable recipients" of special benefits from government services in the sense required by Title V and Budget Circular A-25 is without basis in the language of those provisions or in the statutory purpose. Title V in terms applies to "groups" of, as well as individual, special beneficiaries, and there is no reason for not applying this language in its natural sense where, as here, the group specially benefited consists of the entire membership of an industry.

B. The services whose costs will be supported by the Commission's annual fees provide special benefits to the Natural Gas and Electric Utility industries above and beyond those which accrue from these services to the general public. The Commission's regulatory activities have provided each of these industries with a favorable economic climate in which they have grown and prospered. By contributing to stabilization of rates and supply in both industries, Commission regulation has enhanced public confidence in and demand for their products, as against competing sources of fuel and energy. Specifically, natural gas pipelines have benefited in this way from the Commission's regulation of producers and from its regulation of pipeline rates, and electric utilities have similarly benefited from the Commission's coordination and reliability programs.

C. The fact that the Commission's activities are conducted primarily for the benefit of the general

public does not make the assessment of charges for these activities inappropriate under Title V. Since every governmental activity is intended primarily for the benefit of the public, the holding of the court of appeals on this point would, in effect, render the statute virtually meaningless. Neither the language nor the legislative history of Title V justifies such a restrictive interpretation.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS AUTHORITY UNDER TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT OF 1952 TO IMPOSE ANNUAL FEES ON COMPANIES SUBJECT TO ITS JURISDICTION IN ORDER TO RECOUP A PORTION OF ITS COSTS FOR ADMINISTERING THE FEDERAL POWER ACT AND NATURAL GAS ACT

A. UNDER TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT OF 1952, THE COSTS OF ADMINISTRATIVE SERVICES WHICH SPECIALLY BENEFIT AN ENTIRE REGULATED INDUSTRY MAY BE APPORTIONED AMONG THE INDIVIDUAL COMPANIES WHICH COMPRISE THE INDUSTRY

The court of appeals held that whole industries cannot be "identifiable recipients" of special benefits in the sense required by Title V and Budget Circular A–25 to justify charges (Pet. App. 9a), and that Title V instead authorizes only specific charges for specific services to specific individuals or companies. This, we submit, is an overly restrictive interpretation of Title V. Nothing in the statute suggests that where work performed by a federal agency specially benefits the members of an entire industry, the costs of that activity cannot be apportioned among the companies which make up the industry. The only requirement in Sec-

tion 483a is that services be rendered "to or for any person (including *groups*, associations, organizations, partnerships, corporations, or businesses)" (emphasis added). This language surely does not mean that charges are permissible only when a government service specially benefits only one company. No purpose would be served by such an arbitrary limitation. In a situation where two or more individuals or companies specially benefit from a service, the statutory language is amply broad to authorize the natural result of apportioning the charges among those individuals or companies—regardless of whether the specially benefited group is coterminous with the entire regulated industry.

Similarly, the provision in the Budget Circular that services must provide "special benefits to an identifiable recipient" in order to be chargeable under the Act does not preclude the apportionment of the costs of services which specially benefit an entire industry among the members of that industry. Again this language requires only that the recipient of a benefit be "identifiable," and does not suggest that where services benefit more than one individual, each of those individuals cannot be an identifiable recipient. Where it is found that services specially benefit a whole industry, each company within that industry is an identifiable recipient of the special benefits, and the costs of the services which provide these benefits should be reasonably apportioned among those companies.

This interpretation of Title V was recently adopted by the Court of Appeals for the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.*

There the court found that the general regulatory activities of the Federal Communications Commission provided special benefits to the broadcast industry as a whole, and that the costs of those activities, therefore, could be apportioned among the members of that industry. The court of appeals also held that companies comprising the cable television industry, which did not operate under licenses issued by the FCC, received special benefits as a group from FCC regulation and approved the apportionment of the costs of this regulation among the members of that industry.

Thus, in the instant case, if, as we contend *infra*, the activities which the Federal Power Commission seeks to support through the assessment of annual fees provide special benefits to the natural gas and electric utility industries as a whole, the apportionment of the costs of these activities among the members of those industries should not be struck down on the ground that the recipients of these benefits are not sufficiently "identifiable."[8]

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[8] Contrary to the suggestion of the court of appeals (Pet. App. 9a), the fact that "each company" may not receive benefits "directly proportional to revenue"—the principal basis upon which the annual assessment is calculated—does not preclude a finding that the companies comprising the industry, as a group, are identifiable recipients of a special benefit. This argument at most goes to the issue whether the charges are "fair and equitable" (31 U.S.C. 483a). While the court of appeals here did not reach this issue, the Court of Appeals for the Fifth Circuit in the *Olay* case rejected the claim that such pro-rata charges are improper (464 F. 2d, at 1318, n. 6):

"We find no merit in the NAB's contention that these fees are in reality an unlawful tax because the money involved is

B. THE SERVICES WHOSE COSTS THE COMMISSION SEEKS TO RECOUP THROUGH THE ASSESSMENT OF ANNUAL FEES PROVIDE THE NATURAL GAS AND ELECTRIC UTILITY INDUSTRIES WITH SPECIAL BENEFITS ABOVE AND BEYOND THOSE WHICH ACCRUE TO THE GENERAL PUBLIC

Under the Commission's fee schedule, the cost of the following regulatory activities will be recouped through annual charges: (1) the producer certificate program; (2) pipeline rate regulation; and (3) the electric utility reliability and coordination programs. In addition, the portion of the costs of the Commission's pipeline regulation programs (other than rate regulation) and electric utility regulation programs which is not recouped from filing fees will be included in the annual assessments. These activities, of course, benefit the general public, but they also provide special benefits to the companies subject to the Commission's jurisdiction, above and beyond those accruing to the public. As the Commission significantly noted in Order No. 427 (Pet. App. 30a–31a):

> We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided

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not approximately equal to the *amount of work* rendered by the Commission in behalf of the party against whom the charge is made. The Commission is clearly entitled to charge such fees to recover its costs as are fair considering the value to the recipient, public policy and other pertinent facts. 31 U.S.C. § 483a. By the very terms of the statute 'value to the recipient' is not limited to the amount of work performed but also includes any '. . . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility . . .' *Id.*"

> continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands.

Without disputing the validity of the Commission's analysis, the court below simply held that "[t]he creation of an 'economic climate' is not a special service," but rather "an overly broad benefit" (Pet. App. 9a).

That holding is, we submit, contrary to Subsection (1)(b) of the Bureau of the Budget Circular, upon which the court of appeals purported to rely. That subsection specifically states that "a special benefit will be considered to accrue and a charge should be imposed" when a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary" (Pet. App. 61a). This is precisely the kind of benefit that the electrical power and natural gas industries derive from the many regulatory services of the Commission. For example, the Commission's establishment and continued enforcement of a uniform accounting system, albeit ultimately benefiting the public, has made possible the rapid growth of the electric power and natural gas industries. As one writer has noted (Priest, 1 *Principles of Public Utility Regulation* 39 (1969)):

> It must now be said, as a matter of hindsight, that the stringent accounting regulation en-

forced by the FPC was not only in the public interest, but also in the best interests of the operating companies concerned. What had been dubious items— at least in the light of the new morality—were eliminated from books of account and capital structures became clean, trim and sound. It is questionable whether the electric utility industry would have been able to raise the more than fifty billion dollars which it has required for postwar expansion if these accounting reforms had not been made.

The other programs to be supported by the Commission's annual fees similarly provide special benefits to the assessed industries. With reference to the natural gas industry, interstate pipeline operators (which are the only assessed companies) receive such benefits from both the Commission's producer certificate program and its regulation of pipeline rates.

Among other things, producer regulation has provided pipeline companies with (1) the elimination of indefinite price provisions in producer contracts;[9] (2) standardization of the quality of gas delivered by producers; and (3) the establishment of reasonable terms and conditions regarding advanced payments for gas made by pipeline operators to producers.[10] Moreover, within the context of the overall regulatory scheme, the Commission has taken special steps to increase the

[9] *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33.

[10] *Public Service Commission of the State of New York* v. *Federal Power Commission*, 462 F. 2d 853 (C.A.D.C.); Commission Order No. 465, *et al.*, issued in Docket No. R-411 on December 29, 1972, pending review *sub nom. Public Service Commission of the State of New York* v. *Federal Power Commission* (C.A.D.C.), No. 73-1338.

interstate flow of gas during periods of shortage by authorizing expedited deliveries of gas through the issuance of temporary certificates [11] and by means of the recently promulgated optional certification procedure which is designed to increase the interstate gas supply.[12]

These efforts by the Commission to assure a more stable supply of natural gas, coupled with the Commission's regulation of pipeline rates to keep them at a just and reasonable level, have added to the competitive appeal of natural gas in the overall fuel market and thereby have encouraged consumers to invest in facilities for the use of gas.[13] Thus, while these aspects of the Commission's regulatory program, again, are designed for the benefit of the general public, they also confer substantial special benefits on the pipeline companies, warranting the assessments at issue here.

Similarly, with regard to the electric utility industry, the Commission's reliability and coordination programs enhance the ability of the electric utility companies to meet peak requirements with minimum generating capacity, and help ensure public confidence in the industry's ability to satisfy total demand. Indeed, the value of coordination between

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[11] See *Public Service Commission of the State of New York* v. *Federal Power Commission*, 327 F. 2d 893 (C.A.D.C.).

[12] Order No. 455, *et al.*, issued in Docket No. R-441, August 3, 1972, pending review *sub nom. John E. Moss, et al* v. *Federal Power Commission* (C.A.D.C.), Nos. 72-1837, *et al.*

[13] See, *e.g.*, *Fuels Research Council, Inc.* v. *Federal Power Commission*, 374 F.2d 842, 850-851 (C.A. 7), affirming *Midwestern Gas Transmission Co.*, 34 F.P.C. 978, 982; C. F. Phillips, Jr., *The Economics of Regulation*, pp. 625, 634 (1969).

electric utilities was acknowledged by this Court in *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, where it was stated that to the extent that an electric utility may rely upon an interconnection to supply power during any temporary inability to meet its customers' requirements, "the utility is freed of the necessity of constructing and maintaining its own equipment" (*id.* at 520). Again, the resulting increase in reliability of service at lower cost (and the consequent enhancement of the industry's reputation) enable the industry to compete more favorably with other sources of energy.[14]

In sum, these substantial special benefits, derived by the companies comprising the natural gas and electric

[14] The remaining costs to be apportioned among the interstate pipelines and the jurisdictional electric utilities are the residual costs of the Commission's regulatory activities which are not recouped through filing fees and which are not otherwise recognized in the annual fees. These costs are mainly those incurred by the Commission in the processing of abnormally complex applications or filings. Under Title V these costs could clearly be assessed against the individual companies submitting these filings (and, indeed, the aspect of the Commission's order here establishing increased filing fees has not been challenged in this litigation). See, *e.g.*, *Aeronautical Radio, Inc.* v. *United States*, 335 F. 2d 304 (C.A. 7). Such a procedure, however, would necessitate a determination by the Commission of the cost of the processing of each filing, which would be both expensive and time consuming. In view of this fact and the facts that all jurisdictional companies benefit to some extent from the processing of every filing because of the precedents that evolve therefrom, and that virtually all of these companies participate as intervenors in many proceedings before the Commission each year, thereby placing their views before the Commission for consideration, the Commission's decision to apportion these residual costs is reasonable and permissible under the Act.

utility industries, differ significantly (as an economic matter) from the related benefits derived by the general public from the Commission's regulatory programs and thus justify the assessment of fees under Title V.

C. SINCE THE SERVICES TO BE SUPPORTED BY THE COMMISSION'S ANNUAL FEES PROVIDE SPECIAL BENEFITS TO THE NATURAL GAS AND ELECTRIC UTILITY INDUSTRIES, ABOVE AND BEYOND THOSE WHICH ACCRUE TO THE GENERAL PUBLIC FROM THESE SERVICES, CHARGES FOR THESE SERVICES ARE APPROPRIATE NOTWITHSTANDING THE FACT THAT THE SERVICES MAY BE CONDUCTED PRIMARILY FOR THE BENEFIT OF THE GENERAL PUBLIC

Although, as we have just shown, the benefits derived from Commission regulation by the members of the electric utility and natural gas pipeline industries differ substantially from the benefits received by the public generally, the court of appeals concluded that there is "something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (Pet. App. 9a–10a). Accordingly, in the absence of a "clear Congressional mandate" authorizing the imposition of charges in these circumstances, the court construed Title V to preclude such charges.

This construction (indeed, virtual nullification) of Title V, based apparently on the court's own view of desirable public policy, is contrary to both the purpose and the language of Title V. Every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principal intended beneficiary of a particular program is suffi-

cient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest) and the congressional goal, expressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible", would be defeated.

Moreover, the degree to which the general public might benefit from a particular government service is not cited in Title V as a factor bearing on whether a charge can be assessed against persons who receive special benefit from the service. The language of the Act indicates, instead, that special beneficiaries should be charged for all such services toward the end of making them self-sustaining. The only reference in the statute to the degree of public benefit comes later when "public policy or interest served" is listed as a factor to be considered in determining the fairness of the fee to be charged for particular services.[15]

[15] The fact that the Commission at one time took the position that charges should not be imposed for special benefits accruing from programs primarily adopted for the benefit of the public (Pet. App. 10a) does not preclude the Commission from reconsidering its position. As the court below observed in *City of Chicago* v. *Federal Power Commission*, 385 F. 2d 629, 637 (C.A.D.C.), certiorari denied *sub nom. Public Service Commission of Wisconsin* v. *Federal Power Commission*, 390 U.S. 945: "The Rule of Law does not forbid an agency from modifying its regulatory policy, and the courts have upheld policy revision many times. Indeed one of the signal attributes of the administrative process is flexibility in reconsidering and reforming of policy."

Similarly, the fact that "neither the Natural Gas Act nor Parts II or III of the Federal Power Act impose fees upon

The rather sparse legislative history of Title V confirms this view. In reporting out the measure as a late addition to an appropriations bill, the House Committee on Appropriations stated:

> The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries. * * * [H. Rep. No. 384, 82d Cong., 1st Sess., pp. 2–3].

Accordingly, the Committee explained:

> The bill would provide authority for Government agencies to make charges for these services [*i.e.*, services to special beneficiaries] in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*id.* at 3.]

Nothing in the Report, or elsewhere in the legislative history (see 97 Cong. Rec. 4908), states that it would be inappropriate for an agency to charge for such services by means of annual assessments on the constituent companies of the specially benefited industry where, as here, there is no other provision of law prohibiting such charges. Indeed, one year earlier, in a Sen-

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companies for regulation costs", while such fees are expressly provided for in the administration of "Part I of the Act" (Pet. App. 13a), has no significant bearing on the issue here, since Title V expressly authorizes the imposition of fees and charges and was obviously intended to provide for charges in cases where no such authorization previously existed. See Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices Appropriations for 1953, 82d Cong., 2d Sess., Part 1, pp. 559–560 (1952).

ate committee report (which did not recommend specific legislation) on a study of twelve federal agencies to determine the advisability of increased charges to beneficiaries of federal services, it was specifically noted with reference to services rendered by the Federal Power Commission under the Natural Gas Act and the Federal Power Act that:

> The Federal Power Commission suggests that the imposition of levies upon the gross revenue of regulated enterprises would be an equitable method of recovery of related costs. [S. Rep. No. 2120, 81st Cong., 2d Sess., p. 12.] [16]

Thus, in light of the statutory language and its legislative history, Title V should not be construed to require a determination of whether each government service is conducted primarily for the benefit of the public. The question, instead, is, as stated in Bureau of the Budget Circular No. A–25 (Pet. App. 61a), whether there are "identifiable recipient[s]" of "special benefits * * * above and beyond those which accrue to the public at large * * *." Or, as the Court of Appeals for the Fifth Circuit correctly restated that standard in *Clay Broadcasting* v. *United States, supra,* "the inquiry under 31 U.S.C. § 483a is * * * whether the members of the industry have benefited in a manner different from the public at large from

[16] And more recently, the Commission was commended for promulgating the fee schedule under review in the instant case by Congressman Joe L. Evins, Chairman of the Public Works

the regulatory scheme provided by the Commission" (464 F. 2d at 1322).

In the instant case, as we have shown, the services to be supported by the Commission's annual fees do, under that standard, provide special benefits to the constituent companies of the natural gas and electric utility industries, and the court below accordingly erred in holding those fees to be unauthorized by Title V without regard to whether they are fair and reasonable.

Subcommittee of the House Committee on Appropriations. Chairman Evins addressed Commission Chairman John N. Nassikas as follows:

"At this point, Mr. Chairman [Nassikas], may I state that over the years the Independent Offices Subcommittee on which I served, has urged not only the Federal Power Commission, but the Federal Communications Commission, the Securities and Exchange Commission and others to revise their rate schedules. Many of them have done that. The Renegotiation Board by far more than returns its operating cost. I think the FPC is doing a good job. They have raised their fee rate schedule to $17 million from $7 million and your revised estimate for 1972 is $18,850,000. This will approach putting the FPC on a self-sustaining basis." [Hearings before a Subcommittee of the House Committee on Appropriations on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, 92d Cong., 1st Sess., Part 3, pp. 1164–1165 (1971)].

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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